SUPREME COURT, U. S.
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JOHN F. DAVIS, CLE

(Submitted upon consent of the parties.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 47

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE*

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Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc. of 1 Park Avenue, New York, N. Y. is a membership corporation composed of most of the leading publishers of books of general circulation, including many university presses. It is estimated that the 195 members of the Council publish and distribute over 85% of all general books published in the United States. Neither Appellant nor the publisher of the works in question is a member of the Council.

The Council is deeply interested in safeguarding freedom of the press as guaranteed by the First and Fourteenth Amendments to the Federal Constitution. It sought leave to and did obtain consent of the parties

to file this brief because it believes that Section 484-h of the New York Penal Law is unconstitutional. The Council as a matter of policy takes no position with respect to the obscenity *vel non* of any publication and, therefore, this brief will not address itself to the magazines here involved.

ARGUMENT

POINT I

Section 484-h is unconstitutional in that it makes criminal the dissemination of non-obscene material.

The statute involved here, Section 484-h of the New York Penal Law, is an attempt to reach out and render criminal the dissemination of works which are not obscene. This appears from the face of the statute. It attempts to transmute the various elements which this Court has required to be established in order to prove a work obscene and hence not protectible by the First Amendment. Compare Section 484-h New York Penal Law with *Memoirs* v. *Massachusetts,* 383 U. S. 413, 418 (1966). But the statute goes beyond the elements so delineated by this Court and, of necessity, restricts material protected by the First Amendment. For example, this Court requires that before a work can be adjudged to be obscene it must appeal to "a prurient interest in sex". The statute requires an appeal "to the prurient, *shameful* or *morbid* interest *of minors*". (Emphasis supplied.) The words "shameful" and "morbid" are clearly an attempt to add something not covered by the word "prurient". Similarly, the statute encompasses not only what is "patently offensive" and "utterly without redeeming social importance" but also restricts the dis-

semination of material "patently offensive * * * *for minors*" and "utterly without redeeming social importance *for minors*". (Emphasis supplied.)

The New York Court of Appeals in interpreting this statute construed it as reaching non-obscene material but held such restriction to be permissible since only sales to minors are involved. Thus the New York Court of Appeals stated in *Bookcase, Inc.* v. *Broderick*, 18 N. Y. 2d 71, 75 (1966):

> "The clear implication of these cases is that material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults."

Since *Roth* v. *United States*, 354 U. S. 476 (1957), this Court has held that while obscene material is not protected by the First Amendment, non-obscene material is and hence cannot be suppressed or restricted in the guise of curbing obscenity. Thus this Court stated in *Roth*:

> "It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." At p. 488.

In *Smith* v. *California,* 361 U. S. 147, 152 (1959) this Court pointed out that:

> "our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene."

Similarly, in *Memoirs* v. *Massachusetts, supra,* at p. 418, n. 6 and *Mishkin* v. *New York,* 383 U. S. 502, 506 (1966), this Court sustained the criminal obscenity statutes of Massachusetts and New York respectively although they included in their definition of obscenity words other than "prurient" upon the ground that the state courts in question had construed these other words to be "synonymous with 'obscene'".

Here, however, we have additional words in a definition of restricted material which have not been construed to be synonymous with obscene but rather as words intending to reach and restrict material which is not obscene. We submit, therefore, that the statute is unconstitutional as a restriction on dissemination of non-obscene material.

The danger in such a statute is graphically revealed by the facts in this case. Defendant owns and operates a luncheonette, stationery and candy store in Bellmore, New York. He claims he did not see which publications had been purchased by the minor in question, since he was too busy in the other operations of his small store. To busy shopkeepers, such as the defendant, the statute would impose the practical mandate not to offer for sale any material, whether obscene or not, conceivably reachable by Section 484-h. Offering such material for sale means that a minor might purchase the material at a time when the shopkeeper is too busy to determine the character of the work, as he usually is, and hence the shopkeeper could be guilty of violating the statute. The only safe

way to live under such a statute is to restrict dissemination to everyone, minor and adult alike.

Defendant is typical of the modern paperback bookseller. In large part, paperbacks are sold by stores which are not predominantly booksellers but rather offer racks of paperback books in conjunction with a variety of other goods and services. But sellers such as candy stores, drug stores, variety stores, greeting card shops and newsstands do not have the time or facilities to determine which books are purchased by minors or what the contents of such books are. The net effect of statutes such as 484-h upon such a seller would be to force him not to carry any book possibly covered by it in order not to run the risk of prosecution. Thus everyone, minor and adult alike, would be unable to obtain through the customary channels of paperback distribution books which are not obscene. With the diminution of the outlets for such books, book publishers would become more and more reluctant to publish them. Additionally, art work for book covers would be substantially restricted. It would certainly not be economically feasible to create and print separate book covers of the same book for adults and minors. Accordingly, only those book covers which are safe for sale to minors would be available to adults. Thus in order to allegedly protect minors, all readers would be limited in their choice of reading material.

As this Court stated in *Smith* v. *California, supra,* at p. 154.

> "* * * his timidity in the fact of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. * * * Through it [the bookseller's self-censorship], the distribution of all books, both obscene and not obscene, would be impeded."

To thus effectively restrict the dissemination of literature to the entire community, under the guise of protecting the youth of the community, would be, as Mr. Justice Frankfurter termed it in *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957), "to burn the house to roast the pig."

POINT II

The statute is unconstitutionally vague.

We have pointed out in Point I that the statute goes beyond this Court's definition of obscenity and restricts material not covered by that definition. But the statute never articulates how far beyond the definition of obscene material it intends to go. Dissemination of "shameful" and "morbid" material to minors is made criminal, but nowhere are the limits of these broad, vague and open-ended words delineated. Resort to the dictionary only compounds the confusion as to the meaning of the words. See *Burstyn* v. *Wilson*, 343 U. S. 495, 533 (1952) (concurring opinion holding "sacrilegious" to be unconstitutionally vague). Also uncertain are the exact bounds of standards designed for adults when they are altered to apply to minors. Such a vague, indefinite statute is, we submit, unconstitutional under this Court's decision in *Winters* v. *New York*, 333 U. S. 507 (1948). This Court's comments at pp. 519-520 of *Winters* applies equally to the statute now before this Court:

> "It does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition".

CONCLUSION

For the reasons above stated we urge this Court to hold Section 484-h of the New York Penal Law unconstitutional.

Respectfully submitted,

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